

Respondent argues the claimant's medical expert failed to appropriately compare x-ray findings in order to substantiate his opinion of instability in claimant's spine. Accordingly, respondent requests the Board to affirm the ALJ's Award.

The extent of claimant's functional impairment is the only issue on review before the Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

It was undisputed claimant suffered a work related accidental injury in a motor vehicle accident on September 1, 2000. The sole disputed issue is the nature and extent of disability suffered as a result of the accidental injury.

The ALJ awarded claimant a 10 percent whole body functional impairment based upon the opinion of the treating orthopedic surgeon, Dr. Bernard T. Poole. The doctor rated claimant utilizing the *AMA Guides*¹ based upon a successful one level fusion. Dr. Edward J. Prostic, on the other hand, found claimant to have suffered a 20 percent whole body functional impairment utilizing the *AMA Guides* based upon a loss of motion segment integrity.

Claimant has been employed with respondent for more than 20 years. His job before the accident was as an area manager handling public relations. His job was to interact with other managers and to generate sales. On the day of the accident, September 1, 2000, claimant was leaving Hoisington, Kansas, and heading south in his vehicle when "this lady just pulled right out in front of me, and there was nowhere to go. . . . I was coming south, she pulled off the Barton County College road and she stopped, and I saw her stop, and she just pulled right out in front of me. There was a car coming from the other way, so there was no way for me for [sic] go around her, and I hit the back end of her pickup, on the passenger side. It turned her around and spun her in the other ditch and I went in the other ditch and rolled the van."²

As a result of the accident and his injuries, claimant was sent to Dr. Terrance Tisdale, who then referred claimant to Dr. Poole. Claimant saw Dr. Poole on January 9, 2001, with complaints of lower back and right hip pain. Dr. Poole found claimant had a straining injury to his back, superimposed on pre-existing degenerative disc and facet

¹ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

² R.H. Trans. at 9.

disease and unstable spondylolisthesis at the L5-S1 level of his lumbar spine.³ He recommended claimant do no bending or lifting and to come back in a month.

Claimant saw Dr. Poole for a follow-up visit on February 7, 2001. Dr. Poole indicated that even with the use of back brace and medication claimant still complained of the same symptoms. Surgery was recommended. Claimant first declined, but then went ahead with the surgery on March 9, 2001. Dr. Poole performed a stenosis decompression and an instrumented fusion at the L5-S1 level on claimant's back.

On March 20, 2001, claimant was seen for a follow-up visit. He seemed to be doing well and was told to come back in one month. On April 18, 2001 claimant was seen for another follow-up visit. At this time, claimant had no pain and was released to drive but was told not to lift anything over 20 pounds. Claimant saw Dr. Poole several more times, and was released to return to work on April 2, 2002. On April 29, 2002, claimant was found to be at maximum medical improvement and assigned a 10 percent permanent partial whole body disability rating.⁴ The doctor stated that the rating was the *AMA Guides'* rating for a patient with a successful one level fusion and offered no further explanation nor citation to the page or specific table of the *AMA Guides* supporting his opinion.

At his attorney's request, the claimant saw Dr. Edward Prostic on September 30, 2002. Claimant was complaining of intermittent aching across his low back at waist level without radiculopathy. He experienced stiffness when he woke up and his condition would become worse when he sat, stood, or walked for long periods of time.⁵

Dr. Prostic conducted an examination and reviewed x-rays which showed evidence of decompression at L5-S1 with attempted posterior arthrodesis with pedicle screws. The last set of x-rays that Dr. Prostic reviewed showed no obvious motion at the area of spondylolisthesis, but no obvious arthrodesis either. There was substantial degenerative change at L1-3. The doctor concluded claimant had spondylolisthesis which he defined as slippage in the spine. The doctor noted that in this case claimant's spine from L5 superior slid forward on the sacrum because of defects in the pars interarticularis. And he agreed loss of motion segment integrity is also when a level of the spine slips too far.

Dr. Prostic rated claimant with a 20 percent functional impairment to the whole body as a result of his September 1, 2000 accident, and based on the *AMA Guides*.⁶ Dr. Prostic

³ Poole Depo. at 5-6.

⁴ Poole Depo., Ex. 2 at 7.

⁵ Prostic Depo. at 6.

⁶ Prostic Depo. at 8.

explained that his rating was based upon DRE Lumbosacral Category 4 for loss of motion segment integrity.

As previously noted the sole disputed issue is the nature and extent of claimant's functional impairment. And functional impairment is defined by K.S.A. 44-510e(a), as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body **as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment**, if the impairment is contained therein. (Emphasis added.)

Consequently, the Act requires the amount of the functional impairment be established by competent medical evidence and be based on the *AMA Guides*, if the impairment is contained in the *AMA Guides*.

In this case both doctors diagnosed claimant with spondylolisthesis at L5-S1 which Dr. Prostic described as slippage which he noted was synonymous with loss of motion segment integrity. Dr. Poole concurred that claimant had unstable spondylolisthesis at the L5-S1 level and that is, in fact, why he performed a fusion at that level. Stated another way, the fusion was to provide stability at the level of claimant's spine that had become unstable.

Both doctors based their ratings upon the *AMA Guides*. The ALJ accorded more weight to the treating physician's opinion because he performed the surgery on claimant's back. However, it cannot be said that in all cases the ability to skillfully perform treatment and surgery is synonymous with the ability to skillfully rate the impairment according to the *AMA Guides*. The ALJ discounted Dr. Prostic's rating as being an attempt to reach a desired goal of a high impairment rating, but the Board, based upon the record in this case, cannot so easily discount that testimony.

Arguably, Dr. Prostic's opinion is just as consistent with the tenets expressed in the *AMA Guides* as the opinion expressed by Dr. Poole, perhaps even more so. However, to make an analysis of which doctor's opinion more accurately reflects the intentions of the *AMA Guides*, based upon the record in this case, the finder of fact would be required to go outside the record and independently interpret portions of the *AMA Guides*. Because a decision must be made based upon the evidence introduced before the ALJ, the Board concludes it should not go outside the record to interpret the *AMA Guides* in that manner.

Both doctors recited that their ratings were based upon the *AMA Guides*. Dr. Poole said his rating was for a successful one level fusion. Dr. Prostic said his rating was for lack of segment integrity. The record in this case establishes that claimant had unstable spondylolisthesis (which Dr. Prostic described as synonymous with a lack of segment

integrity) and Dr. Poole performed a one level fusion in an attempt to remedy that condition. In this instance, the evidentiary record fails to persuade the Board that either rating is more credible. Accordingly, the Board will accord equal weight to both opinions and modify the ALJ's Award to find claimant suffers a 15 percent functional impairment as a result of the injuries suffered on September 1, 2000.

AWARD

WHEREFORE, it is the finding of the Board that the Award of Administrative Law Judge Bruce E. Moore dated November 23, 2004, is modified to reflect claimant suffers a 15 percent whole body functional impairment.

The claimant is entitled to 18 weeks of temporary total disability compensation at the rate of \$401 per week or \$7,218 followed by 61.8 weeks of permanent partial disability compensation at the rate of \$401 per week or \$24,781.80 for a 15 percent functional disability, making a total award of \$31,999.80 which is due and ordered paid in one lump sum less amounts previously paid.

IT IS SO ORDERED.

Dated this _____ day of June 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Terry J. Malone, Attorney for Claimant
Seth G. Valerius, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director